

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THEODORE DIAMOND COSTONDE,

Defendant-Appellant.

UNPUBLISHED

October 31, 2006

No. 262114

Oakland Circuit Court

LC No. 2003-193568-FH

Before: Whitbeck, C.J., and Saad and Schuette, JJ

PER CURIAM.

Defendant appeals from his jury trial convictions of possession of 50 grams or more but less than 450 grams of cocaine, MCL 333.7403(2)(a)(iii), and operating a motor vehicle with the presence of a controlled substance, MCL 257.625(8). Defendant also pleaded guilty to driving with a suspended driver's license, second offense, MCL 257.904(1)(c), and possession of an altered driver's license, MCL 257.324. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent prison terms of 4 to 30 years for possession of cocaine, 93 days for operating a motor vehicle with the presence of a controlled substance, 365 days for driving with a suspended driver's license, and 90 days for possession of an altered driver's license. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant says that the prosecution failed to introduce sufficient evidence to convict him of possession of cocaine. We disagree.

Due process requires that the prosecution introduce sufficient evidence for a jury to find that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *Johnson, supra* at 723.

The crime in issue has four elements: (1) the substance was a controlled substance; (2) the weight of the substance meets the statutory definition; (3) the defendant was not authorized to possess the substance; and (4) the defendant *knowingly possessed* the substance. MCL 333.7403(2)(a)(iii); See *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, amended 441

Mich 1201 (1992). Defendant denies that he knowingly possessed the substance and challenges the sufficiency of the evidence on this element of the crime.

Possession may either be actual or constructive. *Id.* at 520; *People v Sammons*, 191 Mich App 351, 371; 478 NW2d 901 (1991). A defendant has constructive possession if the defendant has the power to exercise dominion or control over the substance. *Sammons, supra* at 371. “Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession.” *Id.*; *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The presence of a controlled substance, by itself, is not sufficient to prove constructive possession; rather, constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Wolfe, supra* at 521; *Hardiman, supra* at 421.

Viewed in the light most favorable to the prosecution, the evidence was sufficient for a jury to conclude that defendant had constructive possession of the cocaine. The evidence showed more than mere proximity to the cocaine. Defendant drove the car in which the cocaine was discovered, and the cocaine was concealed under the seat cover of the driver’s seat. Alcohol bottles that defendant admitted belonged to him were also discovered under the driver’s seat. The investigating officer testified that a lump was readily visible where the cocaine was concealed. A mirror with cocaine residue on it was discovered laying on the front passenger seat in plain view. A large amount of cocaine and cocaine byproduct was discovered in defendant’s blood. Although defendant testified that he used cocaine the previous evening, plaintiff’s expert opined that defendant had ingested the substance less than 12 hours prior to the blood draw, which occurred sometime after 8:00 p.m. on October 7. Finally, the cocaine had a street value somewhere between three thousand and eight thousand dollars. A detective for the Oakland Narcotics Enforcement Team opined that a dealer would be unlikely to allow that amount of cocaine to be outside of his possession and control.

From this testimony, a reasonable inference could be drawn that defendant constructively possessed the cocaine. The totality of the circumstances reveals a sufficient nexus between defendant and the cocaine. The prosecution introduced sufficient facts to justify a jury to find that defendant possessed the cocaine.

Defendant also asserts that the trial court erred when it gave a flight instruction requested by the prosecutor because evidence introduced at trial did not support the conclusion that defendant fled. We find that defendant waived this issue. Defendant failed to properly preserve this argument because he failed to object at trial. Defendant initially objected to the proposed flight instruction on the ground that it should only be used where a defendant has fled while in custody, not where a defendant has fled while on bond. However, when the prosecutor sought to introduce evidence of defendant’s apparent flight from a previous proceeding, defense counsel acknowledged that the trial court was “probably bound” by precedent holding that the instruction could be given where defendant has fled while on bond. Defendant did not argue during trial that the evidence did not support a flight instruction. “An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground.” *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Finally, defendant did not renew his objection to the flight instruction, and, moreover, he expressed his satisfaction with the jury instructions after they were given. Therefore, defendant waived review of this issue. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004).

Affirmed.

/s/ William C. Whitbeck

/s/ Henry William Saad

/s/ Bill Schuette